

**Summary of Testimony of  
Nora Mead Brownell  
Commissioner, Federal Energy Regulatory Commission  
Before the Subcommittee on Energy and Air Quality  
of the Committee on Energy and Commerce  
United States House of Representatives  
December 12, 2001**

We are at a critical juncture in the development of energy markets to support the growth of a digital economy. We can succumb to inertia and fear of change, and leave the American public saddled with an inadequate, inefficient electric system. Or, we can complete the transformation of that industry into the economically competitive, technologically vibrant marketplace that this nation's consumers deserve.

I believe we should provide certainty and stability for all stakeholders by: (1) establishing large Regional Transmission Organizations (RTOs); (2) ensuring there is sufficient infrastructure; and (3) ensuring there are equitable, well understood business rules that reflect the realities of a restructured marketplace. There are many provisions in H.R. 3406 that are consistent with this course of action, including the call for standardization of interconnection procedures, the establishment of minimum federal net metering standards, the repeal of the Public Utility Holding Company Act (PUHCA) and the Public Utility Regulatory Policies Act (PURPA), the increase in enforcement tools, and the grant of backstop transmission siting authority to the Commission as well as the authority to require all transmitting utilities to offer open access transmission service.

Large, independent RTOs can improve grid reliability by facilitating transmission planning across a multi-state region, create better pricing mechanisms such as eliminating "pancaking", improve efficiency through better congestion management, and attract investment in infrastructure by facilitating regional consensus on the need for construction. However, Section 202 would continue to allow those who do not recognize the benefits of markets to thwart the development of RTOs by: (1) narrowly prescribing Commission review of an RTO application; (2) allowing an applicant to force a trial-type hearing and obtain judicial stays of Commission RTO orders; and (3) changing the standard for judicial review to make it easier to overturn a Commission RTO order. Therefore, I recommend that Section 202 be replaced with a simple affirmation of Commission authority to issue such RTO orders as are in the public interest.

I believe the rights of participants can be addressed fairly and judiciously by processes the Commission has in place as well as new ones the Commission has implemented in response to state commission and market participant concerns, such as regional federal/state panels and conferences with market participants. These processes will help the Commission expeditiously identify where consensus exists and obtain all the relevant facts where consensus does not exist, so that it can make the best decisions in the shortest amount of time.

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**I. Introduction**

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to share my thoughts on H.R. 3406 as well as the Commission's recent actions concerning wholesale electricity markets. We are at a critical juncture in the development of energy markets to support the growth of a digital economy. We can succumb to inertia and fear of change, and leave the American public saddled with an inadequate, inefficient electric system. Or, we can complete the transformation of that industry into the economically competitive, technologically vibrant marketplace that this nation's consumers deserve. I, for one, am committed to the latter course of action.

Passage of a comprehensive energy bill will certainly settle the many concerns created by the lack of a long-term energy policy for our country. I also believe the resolution of the issues related to the restructuring of the electricity markets will, in fact, act as an economic stimulus and unleash capital for the development of infrastructure and new technologies. I also believe that we at FERC must lay out a clear strategy for completing the transformation of electricity markets. Not only is investment constrained, but business plans are hampered by uncertainty. I am convinced that the prerequisite to

success is creation of a clear and cogent course of action that will bring certainty and stability for all of the stakeholders by: (1) establishing large Regional Transmission Organizations (RTOs); (2) ensuring there is sufficient infrastructure; and (3) ensuring there are equitable, well understood business rules that reflect the realities of a restructured marketplace.

There are many provisions in H.R. 3406 that I support as consistent with this course of action, including the call for standardization of interconnection procedures, the establishment of minimum federal net metering standards, the repeal of the Public Utility Holding Company Act (PUHCA) and the Public Utility Regulatory Policies Act (PURPA), the increase in enforcement tools, and the grant of backstop transmission siting authority to the Commission as well as the authority to require all transmitting utilities to offer open access transmission service. I commend the continued leadership and hard work of the members of the Subcommittee. I would, however, suggest that Section 202, concerning the formation of RTOs, and Section 141, repealing Commission review of mergers, be amended.

## **II. Section 202--RTO Formation**

### **A. RTO formation has been delayed at the expense of electricity customers**

Large, independent RTOs can improve grid reliability by facilitating transmission planning across a multi-state region, create better pricing mechanisms such as eliminating "pancaking", improve efficiency through better congestion management, and attract investment in infrastructure by facilitating regional consensus on the need for

construction. Consistent with the Energy Policy Act of 1992, the Commission has been working to foster RTOs for a number of years. So far, the Commission has relied on the voluntary efforts of utilities to form RTOs, and has held mediation and outreach to assist market participants in reaching consensus on RTO governance, scope, and configuration. Nevertheless, to date not a single RTO is up and running.

I believe the price of doing nothing on RTO formation grows daily and that we must move forward. The Commission has recently initiated a number of processes to help ensure that any actions we take concerning the development of RTOs be ones that will produce the most benefits for customers and that adequately accommodate states' interests. First, the Commission recently hired an outside consultant to perform an updated study of the costs and benefits of RTO formation. Second, we have begun to consider the standard RTO design features that will best ensure a seamless national wholesale electricity market. During the week of October 15, 2001, we held a conference to discuss the issue of standard RTO design features with a wide range of market participants and state commissions, and we will be doing more outreach and issuing a proposed rule on the subject. Our RTO conference demonstrated considerable consensus on a number of issues, such as congestion management, energy markets, and market monitoring. Third, we have set up a new program within FERC under which a number of regional panels consisting of Commission staff and state commission staff will be established to ensure better coordination with our state regulatory counterparts on RTO development issues.

It may soon become necessary for the Commission to take more direct action to establish mandatory RTOs. I believe the current language of the Federal Power Act already gives us the authority to take such action, and I will encourage my colleagues to join me in exercising that authority in a prudent manner. Nevertheless, the few who oppose RTOs would likely file judicial challenges to the exercise of that authority, thus legislative clarification would save us all the time and expense of litigation.

B. Section 202 would not speed development of competitive markets

Section 202 of H.R. 3406 does clarify that the Commission has the authority to require transmitting utilities, whether investor- or publicly-owned, to join an RTO. However, the following provisions of Section 202 would leave the Commission so hamstrung in its exercise of this authority, that I fear we would make no greater progress toward the development of truly competitive wholesale electricity markets than we have under the current statute:

*Narrowly prescribing Commission review of an RTO application--* Section 202 limits the Commission's authority over the development of specific RTOs to proposing modifications to a utility's application to form or join an RTO. Further, the Commission can only propose such modifications when the application fails to satisfy a rigid and limited set of standards specified in the bill.

*Allowing applicants to unnecessarily delay process--* The provisions of Section 202 requiring the Commission to hold an "evidentiary" trial-type hearing on the

proposed modifications whenever an applicant so requests and imposing a stay of the Commission's order whenever an applicant seeks judicial review could enable one RTO applicant to significantly delay and increase the cost of RTO formation.

*Making it easier for applicants to overturn Commission orders*--Section 202's replacement of the existing "substantial-evidence" standard for judicial review under the Federal Power Act with a "preponderance-of-the-evidence" standard for review of Commission modifications to RTO applications would make it easier for applicants to overturn such modifications.

C. Section 202 should be replaced with a simple affirmation of Commission authority to issue such RTO orders as are in the public interest

I believe that Section 202 may not achieve the goals that the Subcommittee has identified, i.e., the creation of competitive markets. Therefore, I urge this Subcommittee either to replace it with a provision simply affirming the Commission's authority to issue such orders concerning the establishment, design, and operation of RTOs, and the participation of transmitting utilities therein, as are in the public interest. I would also urge the Subcommittee to consider tax code amendments to ensure that electric cooperatives and public power entities do not lose their tax-exempt status by transferring transmission assets over to a for-profit RTO.

### **III. Section 141-Merger Review**

Section 141 would repeal Section 203 of the Federal Power Act and, thus, leave review of mergers and other dispositions of public utility facilities to the Department of Justice and the Federal Trade Commission. While I support coordination of federal agency review of proposed utility mergers to ensure that such reviews are not duplicative or overly time-consuming, I do not believe it is appropriate to eliminate FERC review. The Commission has knowledge of the electric utility industry that the federal antitrust agencies do not, and Commission review is necessary to ensure that mergers and other dispositions are consistent with the public interest.

#### **IV. Other Provisions of H.R. 3046**

Although I would suggest changes to Sections 202 and 141, there are other provisions of H.R. 3046 that I heartily endorse.

A. Section 101 would ensure standardization of interconnection procedures and allow consideration of an application's effect on competition

Section 101 calls for standardization of interconnection procedures. I strongly support the development of standardized interconnection procedures, and I am happy to report that the Commission is conducting a rulemaking to address this issue.

I further support the proposed amendment of the criteria for evaluating an interconnection application. Under the existing language of section 210 of the Federal Power Act, the Commission may grant an application if it is in the public interest and it would either encourage overall conservation, optimize efficiency, or improve reliability. This bill would allow the Commission to grant an application if it were in the public

interest and promoted competition. This language allows the Commission to continue to consider conservation, efficiency and reliability, while also permitting the Commission to consider competitive goals that will truly benefit consumers.

B. Section 102's net metering standards would remove a barrier to entry of new technology

I support the bill's call for minimum federal net metering standards. Most utilities have been slow to provide for net metering, and net metering is an essential step in the development of viable markets for new technologies, such as distributed generation. The establishment of national minimum standards on which states will build net metering programs would enable this important new technology a chance to compete. Net metering is also a valuable tool for consumers who want to be actively involved in their purchasing decisions.

C. Sections 111-125 would appropriately repeal PUHCA

I support the bill's repeal of PUHCA. PUHCA was necessary to address abuses that existed a half-century ago. However, that statute has not only outlived its usefulness, it is actually thwarting needed development of our electricity resources by subjecting registered utility holding companies to heavy-handed regulation of ordinary business activities and to outdated requirements that they operate “integrated” and contiguous systems. One of PUHCA's perverse effects is that it causes foreign companies to buy here and U.S. companies to invest overseas. Nevertheless, I appreciate the concerns of those, like the rural electric cooperatives, who have opposed elimination of certain



safeguards that PUHCA provides against market power. The Commission is aware of the concerns of the cooperatives and of the problems with market power in general, and we are engaged in an overhaul of our efforts at market monitoring and market power protection. I believe that Section 111-125 strikes an appropriate balance by replacing PUHCA with increased access by the Commission and state regulators to certain books and records.

D. Sections 131-134 would appropriately eliminate prospective PURPA forced sales

I support the bill's prospective elimination of the forced sale provision of PURPA. PURPA was enacted out of concern over dependence on oil for electric generation. Now, 22 years later, when a gas-fired generator can be on-line in less than two years, and many advances are being made in distributed generation, PURPA's subsidies for certain types of generation are no longer appropriate.

E. Section 201 would ensure non-discriminatory access to the entire transmission grid

Section 201 would grant the Commission the authority to require all transmitting utilities (not just those that constitute "public utilities" under the Federal Power Act) to offer open access transmission service. I believe that all interstate transmission facilities should be under one set of open access rules, including the facilities owned and/or operated by municipals, cooperatives, the Tennessee Valley Authority, and the federal power market administrations and regardless of whether they are used for unbundled

wholesale, unbundled retail, or bundled retail transactions. Having all transmission under one set of rules will ensure a properly functioning and transparent transmission grid.

F. Section 301 will promote transmission reliability

I support Section 301, which grants the Commission jurisdiction over electric reliability organizations. The reliability of the electrical grid is critical to this nation's safety and economy, and it is appropriate to have a greater governmental role in reviewing reliability standards.

G. Section 402 will remove logjams to siting needed transmission

As I stated in my September 21, 2001 testimony before this Subcommittee, I believe the Commission should have backstop authority to site transmission facilities. State-by-state siting of such transmission superhighways is an anachronism that impedes transmission investment and slows transmission construction. There are many models for regional planning that might be considered. For example, the Western Governors Association has been working hard to address regional issues in the West. Therefore, I support section 402, which allows the Commission to authorize construction of transmission facilities that are consistent with the public interest when the state has withheld or delayed approval. But I also believe new models may respond to siting issues in a way that recognizes state concerns while accepting the reality that electricity planning and operations are regional, if not national, in nature.

H. Sections 701-703 would provide needed expansion of enforcement authority

The Commission must have an expanded role in monitoring for, and mitigating, market power abuse. The enabling statutes of the Securities and Exchange Commission and the Federal Communications Commission provide for a range of enforcement measures, such as civil penalties. I believe that providing FERC with similar authority would send a powerful message to electricity market participants that we take violations of the Federal Power Act just as seriously. Therefore, I support H.R. 3406's recognition of the Commission's refund authority over non-public utilities that provide transmission service or power to a public utility. I also support the bill's increase in the level of criminal penalties allowed under Section 316 of the Federal Power Act, as well as the bill's authorization of civil penalties for violation of any provision of Part II of the Federal Power Act.

## **V. Conclusion**

I appreciate the enormous commitment of time and energy that the Chairman and the other members of this Subcommittee have put into developing legislation to help transform the electricity industry into the thriving force it should be. There are many competing interests to be satisfied against a larger goal: the creation of a robust, viable, liquid energy market supported by an enhanced infrastructure. Our country is well served by change leaders such as yourself. I thank you for the opportunity to share my thoughts with you.